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CHARLES ELMORE GROPLEY
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IN THE
Supreme Court of the United States

OCTOBER TERM—1945

No. 240

SOLLY WEISS,

Petitioner,

against

THE UNITED STATES OF AMERICA,

Respondent.

**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE SECOND
CIRCUIT, AND BRIEF IN SUPPORT THEREOF**

WALTER BROWER,

By JOHN W. BURKE, JR.,
Counsel for Petitioner.



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IN THE
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No.

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against

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**PETITION FOR WRIT OF CERTIORARI TO THE
CIRCUIT COURT OF APPEALS FOR THE
SECOND CIRCUIT**

*To the Honorable Chief Justice of the United States and
the Associate Justices of the Supreme Court of the
United States:*

Your petitioner respectfully shows:

I

Summary Statement of the Matter Involved

Petitioner, having been convicted for violations of Maximum Price Regulation 445 of the Office of Price Administration promulgated under the Stabilization Act of 1942, was sentenced under the Emergency Price Control Act of 1942 to imprisonment for six months and to pay a fine of \$25,000, \$5,000 on each of five counts of the information (fol. 383). Section 205 of the Emergency Price

Control Act of 1942 (50 U. S. C. A. App. 925(b)) prescribes a maximum fine of \$5,000 for each violation of any regulation promulgated pursuant to that Act. Section 11 of the Stabilization Act of 1942 (50 U. S. C. A. App. 971) prescribes a maximum fine of \$1,000 for violation of any regulation promulgated under that Act. The Stabilization Act continued the Emergency Price Control Act in effect except in so far as its provisions were inconsistent with the latter (50 U. S. C. A. App. 967).

Maximum Price Regulation 445 was promulgated by the Price Administrator under authority of Executive Orders 9250 and 9328 (50 U. S. C. A. App. pp. 314, 318). Each of these Executive Orders recites that it was issued by virtue of the authority vested in the President by the Constitution and the statutes and particularly by the Act of October 2, 1942 (The Stabilization Act) which amended the Emergency Price Control Act of 1942.

The Circuit Court of Appeals for the Second Circuit has held in this case that Maximum Price Regulation 445 was promulgated, at least in part, pursuant to the Emergency Price Control Act of 1942 and therefore the penalties of that Act and not those of the Stabilization Act of 1942 are applicable to violations of that Regulation. The basis of this conclusion is that otherwise the saving clause in the Stabilization Act of 1942 which continued in effect penalties prescribed by the Emergency Price Control Act of 1942 in so far as consistent with the Stabilization Act would have no meaning. The penalty provisions of the two acts are inconsistent. The Circuit Court of Appeals left unanswered the applicability of the new penalties created by Section 11 of the Stabilization Act of 1942. Under the Circuit Court of Appeals decision, Section 11 of the Stabilization Act of 1942 has no meaning.

This is a criminal action upon an Information filed against petitioner in the United States District Court for the Southern District of New York at the June Term, 1944,

charging him in thirteen counts with offering and agreeing to sell, and selling and delivering Scotch whiskey at prices in excess of those prescribed by Maximum Price Regulation 445 of the Price Administrator (fols. 4-35). The trial, by jury, held on November 1 and 2, 1944, resulted in a verdict of "Guilty" on all counts (fol. 358). Motions to dismiss the Information, for a directed verdict and to set aside the verdict were all denied and due exception taken (fols. 200-213, 300-308, 359-381). Petitioner was sentenced on November 15, 1944 to six months' imprisonment on Counts 1, 2, 3, 4, 5, 6, 7, 9, 11 and 12 of the Information, to run concurrently, and a fine of \$5,000 on five of these counts totalling \$25,000. Imposition of sentence was suspended on Counts 8, 10 and 13, and petitioner placed on probation for two years (fol. 283).

Petitioner appealed from the judgment to the Circuit Court of Appeals for the Second Circuit, which affirmed with an opinion (pp. 148-154). The questions on appeal were: (1) whether the fines imposed exceeded the legal maximum prescribed for the offenses charged; (2) whether there was a total failure of proof of an essential element of the offenses charged, to wit: the maximum price applicable to the alleged offers to sell and the sales attributed to petitioner and (3) whether petitioner's acts were violative of the statute under which he was accused. The opinion of the Circuit Court of Appeals did not mention the second question.

Counts 1, 4, 7, 9 and 11 of the Information charge that petitioner offered and agreed to sell certain whiskey at prices in excess of the legal maximum. Counts 2, 3, 5, 6, 8, 10, 12 and 13 charge that the petitioner sold and delivered the whiskey allegedly offered for sale. Delivery of the whiskey allegedly offered for sale was made in installments. Each installment was charged to be a separate sale, and was the subject of a separate count in the Information (fols. 4-35).

Petitioner, the sales manager for a wine company, acquainted with persons in the whiskey importing industry, met one Moret in New York in September, 1943 (fols. 227, 228, 44). Moret was in the wholesale beer, wine and liquor business in Atlanta, Georgia (fol. 42). Petitioner asked Moret if he were interested in buying Scotch whiskey (fol. 46). Upon receiving an affirmative answer, petitioner told Moret that he could get some for him, through Park Benziger & Company, whiskey importers (fols. 46, 105). He told Moret that he would have to pay Park Benziger & Company the ceiling price of \$11.82 a case, and pay petitioner \$13.68 a case for his trouble in putting him in touch with Park Benziger & Company (fols. 48, 105). Moret, the Government's witness, testified as follows:

“Q. In summary your understanding with Weiss was that if you would write Park Benziger & Company, Park Benziger & Company would sell you 500 cases of Scotch Whiskey and that you would pay Park Benziger for it and that you would pay Weiss for his trouble in putting you in touch with Park Benziger, is that right? A. Yes, sir” (fol. 105).

In accordance with petitioner's instructions Moret wrote to Park Benziger & Company, ordering 500 cases of whiskey, on September 20, 1943 (Gov. Ex. 1). Park Benziger & Company sent the whiskey to Moret in two installments of 250 cases each, together with its invoice at \$11.82 a case and sight draft which Moret paid (Gov. Exs. 2, 3, 4, 5). Petitioner had no connection whatever with Park Benziger & Company except as a friend of one of its employees (fols. 218-220). He at no time owned or controlled any of the whiskey sold to Moret by Park Benziger & Company (fols. 240-242). Moret paid petitioner \$6,804 for his services in getting this whiskey for him (fols. 67, 105). This transaction was the basis of the first three counts of the Information; the first charging petitioner with offering to sell 500 cases, the second with selling and delivering 250 cases of the allegedly offered whiskey, and the third with selling

and delivering the balance of 250 cases allegedly offered (fols. 5-11).

Identical transactions with Moret and with Waldorf Liquors, Inc. were the subjects of the remaining counts of the Information. The transactions with Waldorf Liquors, Inc. were of the same character as those with Moret, except that petitioner told one Schoenfeld of Waldorf Liquors, Inc. that International Distributors, Inc. would sell and deliver the whiskey to it. In respect of these transactions, Schoenfeld, the Government's witness, with whom petitioner had the transaction, testified as follows:

"Q. You had your dealings as to the whiskey with someone other than Weiss? A. The firm gave me the allocation.

"Q. The International Distributors delivered that whiskey? A. Yes.

"Q. The International Distributors charged you for that whiskey? A. Yes.

"Q. You paid the International Distributors for that whiskey? A. Yes.

"Q. The only thing that Weiss did was to use his influence so you could get it, is that correct? A. That is correct" (fols. 186, 188).

Petitioner had no connection whatever as employee, agent or servant of International Distributors, Inc. (fol. 224). He at no time owned or controlled any of the whiskey allegedly offered and sold by him to Waldorf Liquors, Inc. (fols. 218-220, 224, 240-242).

Although the maximum selling price under the Regulations to which Park Benziger & Company and International Distributors, Inc. were subject was stipulated to be \$11.82 a case, no proof of any maximum selling price applicable to offers to sell or sales by petitioner was given (fols. 171, 173).

The Circuit Court of Appeals held: (1) that the transactions between petitioner and Moret and Waldorf Liquors,

Inc., whereby petitioner agreed to get whiskey for them for a fee, was a contract to sell them whiskey; (2) that one need never have title in himself in order to transfer title to a buyer even though he is not the agent of the owner if he has "command" over the goods; (3) that Maximum Price Regulation 445 at least in part was promulgated pursuant to the Emergency Price Control Act of 1942 and that, therefore, the penalties of that Act and not those of the Stabilization Act of 1942 are applicable to violations of that Regulation.

Questions Presented:

1. Are the penalties prescribed by the Emergency Price Control Act of 1942 or the penalties prescribed by the Stabilization Act of 1942 applicable to violations of regulations promulgated at least in part under the authority of the latter Act?
2. Was it a departure from the accepted and usual course of judicial proceedings for the Circuit Court of Appeals to affirm the instant judgment of conviction when there was a total failure of proof of any ceiling price prescribed by any regulation applicable to offers to sell, sales or deliveries of whiskey by petitioner?
3. Under the Emergency Price Control Act of 1942 or the Stabilization Act of 1942 can one be properly convicted of selling at prices in excess of the legal maximum goods of which he at no time was the owner or the agent of the owner?
4. Did the acts of petitioner constitute offers to sell, sales or deliveries of whiskey at prices in excess of the legal maximum under either of these Acts?

Reasons Relied Upon for Allowance of Writ

1. The great importance of the Emergency Price Control Act of 1942 and the effect of the Stabilization Act of 1942, amendatory thereof, to the United States, to the business world and legal profession, and the need of an authoritative opinion, particularly as to the conflicting penal provisions of these Acts, calls for a construction of the Acts by this Court.

2. The decision of said Circuit Court of Appeals holding that it is unnecessary for a seller, not the agent of the owner of goods, ever to have title to goods in order to transfer title to them, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. The decision of said Circuit Court of Appeals, holding that there was evidence, from which the jury could find that petitioner was an offeror or seller of the whiskey in question, at prices in excess of any legal maximum, so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, forthwith to certify and send to this Court a full and complete transcript of the records and proceedings of said Court had in the case numbered and entitled on its docket "No. 324, October Term 1944, United States of America, Appellee, against Solly Weiss, Appellant," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, that

the judgment herein of said Circuit Court of Appeals be reversed by this Court, and for such other and further relief as to this Court may seem just and proper.

Dated: July 16, 1945.

WALTER BROWER,

By JOHN W. BURKE, JR.,
Counsel for Petitioner.





IN THE
Supreme Court of the United States

OCTOBER TERM—1945

No.

SOLLY WEISS,

Petitioner,

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THE UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION

I

Opinions Below

The opinion of the District Court has been reported at 57 F. Supp. 747. The opinion of the Circuit Court of Appeals has not yet been reported.

II

Jurisdiction

1. The date of the judgment to be reviewed is June 20, 1945 (p. 155).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925 (28 U. S. C. A. 347(a)).

III

Statement of the Case

This is a criminal action decided in the Circuit Court of Appeals for the Second Circuit in which final judgment has been entered (p. 155). Petitioner prays that this Court, by certiorari, require the lower court to certify the cause to this Court for determination. The cases which it is believed sustain the petition to this Court are as follows:

United States v. Yuginovich, 256 U. S. 450;
McNabb v. United States, 318 U. S. 332;
Nardone v. United States, 308 U. S. 338.

IV

Statement of Facts

The facts and questions involved have already been stated in the preceding petition at pages 1 to 6 which statement is hereby adopted and made a part of this brief.

V

Specification of Errors

1. The Circuit Court of Appeals erred in holding that the penalties of the Emergency Price Control Act of 1942 apply to the offenses charged in the Information rather than the penalties prescribed by Section 11 of the Stabilization Act of 1942.

2. The Circuit Court of Appeals erred in holding that it was unnecessary for a seller, not the agent of the owner of the goods in question, ever to have title to the goods in order to convey the same, under its construction of Section 4(a) of the Emergency Price Control Act of 1942 (50 U. S. C. A. App. 904(a)).

3. The Court erred in holding that there was any evidence that petitioner offered to sell or sold any of the whiskey in question.

4. The Circuit Court of Appeals erred in affirming the judgment of the District Court, because of the absence of any proof of any maximum legal price attributable to offers to sell or sales by petitioner.

POINT A

The sentence imposed by the Court exceeds the legal maximum prescribed for the offenses charged.

In addition to the term of imprisonment to which petitioner was sentenced, the Court imposed a fine of \$5,000 on each of Counts 2, 3, 5, 6 and 12 of the Information. In imposing this fine the Court applied the penalties prescribed by Section 205(b) of the Emergency Price Control Act of 1942 (50 U. S. C. A. App. 925). This section provided a penalty for violation of Section 4 of the Act (50 U. S. C. A. App. 904) of a fine of \$5,000.

The Emergency Price Control Act of 1942 was amended on October 2, 1942 by the Stabilization Act of 1942 (50 U. S. C. A. App. 961-971). The Stabilization Act of 1942 authorized the President to issue a general order stabilizing prices, wages and salaries affecting the cost of living, and conferred power upon him to delegate his authority. The same Act extended the Emergency Price Control Act of 1942, with certain specified exceptions, to June 30, 1944 (50 U. S. C. A. App. 967). This section provides in part as follows:

“(b) All provisions (including prohibitions and penalties) of the Emergency Price Control Act of

1942 (section 901 et seq. of this Appendix) which are applicable with respect to orders or regulations under such Act shall, *insofar as they are not inconsistent with the provisions of this Act*, be applicable in the same manner and for the same purposes with respect to regulations or orders issued by the Price Administrator in the exercise of any functions which may be delegated to him under authority of this Act." (Emphasis supplied.)

The Stabilization Act of 1942 prescribed the punishment for violating its provisions or any regulation promulgated thereunder, fixing the maximum fine for such violation at \$1,000 instead of \$5,000 as provided in the Emergency Price Control Act. The penalty provision of this Act reads as follows (50 U. S. C. A. App. 971):

"Any individual, corporation, partnership, or association willfully violating any provision of this Act, *or of any regulation promulgated thereunder*, shall, upon conviction thereof, be subject to a fine of not more than \$1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment. Oct. 2, 1942, c. 578, § 11, 56 Stat. 768." (Emphasis supplied.)

Pursuant to the authority granted to the President by the Stabilization Act of 1942, the President issued Executive Orders 9250 and 9328, Executive Order 9250 (50 U. S. C. A. App. p. 314) dealing with the stabilization of national economy, and Executive Order 9328 dealing with the stabilization of wages, prices and salaries (50 U. S. C. A. App. p. 318). Executive Order 9250 recited the authority under which it was issued, as follows:

"By virtue of the authority vested in me by the Constitution and the statutes and particularly by the Act of October 2, 1942" (The Stabilization Act).

Similar reference to the empowering statute was made in Executive Order 9328 (50 U. S. C. A. App. p. 314).

Maximum Price Regulation 445 was promulgated by the Price Administrator under authority of Executive Orders 9250 and 9328, and therefore under the Stabilization Act of 1942. Section 1420.201 of Maximum Price Regulation 445 recites the authority for its promulgation as follows:

“Under the authority vested in the Price Administrator by the Emergency Price Control Act of 1942, as amended, the Executive Orders Nos. 9250 and 9328, Maximum Price Regulation No. 445 (Distilled Spirits and Wines), which is annexed hereto and made a part hereof, is hereby issued.”

The reference to the Emergency Price Control Act of 1942, *as amended*, incorporated into this preamble the Stabilization Act of 1942, the amending statute.

Since petitioner's violation, if any, was of a regulation promulgated under the Stabilization Act of 1942, the criminal penalties of that statute, by its very terms, are applicable. This is evident from the language of the Act which extends the period of effectiveness of the Emergency Price Control Act of 1942 in so far as it is not inconsistent with the provisions of the later Act. The criminal penalties prescribed by the Stabilization Act of 1942 are clearly inconsistent with the criminal penalties prescribed by the earlier Act.

When a new statute dealing with the same subject-matter as an older one is enacted, the older statute is impliedly repealed to the extent that it is inconsistent with the new statute (*Norris v. Crocker*, 54 U. S. 429 (1851)). In *United States v. Yuginovich*, 256 U. S. 450 (1920), the Court said at page 463:

“It is, of course, settled that repeals by implication are not favored. It is equally well settled that a later statute repeals former ones when clearly inconsistent with the earlier enactments. *United States v. Tynen*, 11 Wall. 88. In construing penal statutes, it is the rule that later enactments repeal former ones practically covering the same acts but fixing a lesser penalty.”

See also: *United States v. Mangano*, 299 Fed. 492 (C. C. A. 8, 1924); *Maresca v. United States*, 277 Fed. 727, 738 (C. C. A. 2, 1921).

In holding that the instant Regulation was promulgated, at least in part, under the Emergency Price Control Act of 1942 and applying the severer penalties of that Act to the offenses charged, the Circuit Court of Appeals has disregarded the rule in favor of clemency. The Circuit Court of Appeals impliedly concedes that the instant Regulation, at least in part, was promulgated under the Stabilization Act of 1942. This Act, in continuing in effect those provisions of the Emergency Price Control Act of 1942 not inconsistent with it, was a later statute covering the entire ground of the former, but repealing those provisions of the former Act inconsistent with it. The criminal penalty provisions of the two Acts are inconsistent. The rule in favor of clemency therefore should be applied. The rule in favor of clemency is stated in *United States v. Windham*, 264 F. 376 (E. D. S. C. 1920), at page 377:

“The general rule for the construction of statutes is that, when a later statute is enacted inconsistent with a preceding statute and covering the entire ground of the subject-matter, it supersedes and impliedly repeals the preceding statute. Especially is this the case when the later statute imposes penalties of less severity for the same offenses; the rule in favor of clemency being that, where different penalties are imposed for the same offense, the lighter penalty, when imposed in a later statute, is presumed to supersede the earlier and heavier.” (Cited with approval, *United States v. Yuginovich*, *supra*, p. 462.)

The Circuit Court of Appeals was in error in declaring that to hold that the inconsistency between the penalties in the two Acts would throw Section 7(b) (50 U. S. C. A. App. 971) out of operation and reduce it to impotence because it would leave no penalties upon which it could oper-

ate. The Emergency Price Control Act of 1942 contains penalties not referred to in the Stabilization Act of 1942 such as single and treble damages, licensing and injunctive sanctions (50 U. S. C. A. App. 925). These penalties are left undisturbed by the saving provisions of Section 7(b) of the later Act (50 U. S. C. A. App. 967(b)). There is, therefore, no incongruity in construing the criminal penalty provisions of the Emergency Price Control Act of 1942 to have been specifically modified by the explicit criminal penalty provisions of the Stabilization Act of 1942.

POINT B

There was a complete failure of proof of an essential element of the offenses charged in the Information, that is, the maximum price for the whiskey allegedly offered, sold and delivered by petitioner applicable to offers, sales and deliveries by him.

An essential element of the offenses charged was that petitioner offered to sell and sold whiskey at prices above the legal maximum applicable to him. The Information charges that petitioner offered to sell and sold whiskey for sums exceeding \$11.82 a case, the maximum price permitted to be charged by him under the Maximum Price Regulation. Although it was stipulated at the trial that the legal maximum price for sales of whiskey by the importers, Park Benziger & Company and International Distributors, Inc. was \$11.82 a case (fols. 171, 173), there was no evidence or stipulation respecting any maximum price chargeable by petitioner.

Maximum Price Regulation 445 establishes classifications of sellers, to-wit: importers, wholesalers, primary distributors, processors, retailers, monopoly states, trustees in bankruptcy, receivers, administrators, executors,

fiduciaries or other court officers, sheriffs, *et al.* (Sections 1.1 and 5.1, MPR 445). The Regulation prescribes a different price for each of these categories of sellers. There was no attempt at the trial to prove that petitioner came within any of these classifications. There was evidence, however, that he was not an importer and therefore not subject to the price limitation of \$11.82 a case (fols. 240-242).

In order to establish a violation of the Regulation it is necessary to prove not only that the accused sold whiskey, but also that he sold it at a price in excess of the maximum applicable to him. The Government has this burden of proof. *Henderson v. J. B. Beaird Corp.*, 48 F. Supp. 252, 255 (W. D. La., 1943); *Brown v. Nu-Way Laundry Co.*, 52 F. Supp. 498, 500 (W. D. Okla., 1943); *United States v. Johnson*, 53 F. Supp. 167 (D. C. Del. 1943).

POINT C

Petitioner's acts were not criminal.

It is not contended by the Government that either Park Benziger & Company or International Distributors, Inc., as vendors, offered to sell or sold any whiskey at prices in excess of the proper maximum prices. There is no suggestion, therefore, that these vendors evaded the Regulation and were aided and abetted in such evasion by petitioner. The Government's theory is that the petitioner was the offeror, vendor and deliverer of the whiskey.

It was not an offense under the Regulation in effect at the time of the instant transactions to act as a finder or broker in the sale of whiskey and to receive fees for such services. The Maximum Price Regulation prohibited such fees only if they were paid to the vendor and increased his price for the whiskey above the legal maximum.

On May 2, 1944, long after the transactions in question in the Information, Maximum Price Regulation 445 was

amended by the addition of Section 7.2(a), which reads as follows:

“(a) Every broker shall be considered as the agent of the seller and not the agent of the buyer. In each case the amount paid by the buyer to the seller plus any amount paid by the buyer to the broker shall not exceed the seller’s maximum price plus allowable transportation charges actually paid by the seller or by the broker. The term ‘broker’ includes a ‘finder,’ ‘buyer’s agent’ and ‘seller’s agent.’ ”

This amendment was added to the Regulation to correct what the Price Administrator considered an abuse and to block a loophole which he recognized to exist in the original Regulation. In view of this amendment to the Regulation specifically dealing with finder’s fees, it must be presumed that the original Regulation did not cover such fees. Consequently, at the time of the transactions denounced by the Information, finder’s fees were not proscribed or regulated except in so far as they might be received by vendors for the purpose of evading the Regulation.

It is a rule of construction that when the legislature enacts an amendment, that, in itself, is an indication of an intention to alter the pre-existing law.

Crawford, Construction of Statutes, Sec. 304, p. 618;

Louisville & Nashville R. R. v. Mottley, 219 U. S. 467, 475-476 (1911);

United States v. Bashaw, 152 U. S. 436 (1893).

Petitioner acted as a finder in the instant transactions and did not offer to sell or sell and deliver any whiskey. Not a single witness testified to the fact or to any legal conclusion that petitioner offered to sell or sold any whiskey. The witnesses testified that petitioner told them that

whiskey could be obtained from someone else for them and that they paid him for using his influence in getting the owners of whiskey to allocate it to them. Every exhibit offered by the Government, consisting of invoices and drafts rendered by the owners of the whiskey to Moret and Waldorf Liquors, Inc., shows who the actual vendors and deliverers were. In the face of this uncontradicted evidence the Court below affirmed the action of the Trial Court in submitting the case to the jury to determine whether or not petitioner offered to sell, sold and delivered whiskey at prices in excess of the legal maximum.

The Circuit Court of Appeals has held that one may sell property which he does not own and that he need never acquire title to such property in order to pass it to a buyer, if in fact he has "command over the goods at the time of performance, so that he can procure the transfer of title from the owner to the buyer." This holding introduces a new and untenable rule into the law of property. The accepted rule is that no one can sell what he does not own unless he is the agent of the owner. Under this holding this rule is extended to permit one who has "command" over the property to convey title to it. No definition is given of the word "command." Ordinarily one who has "command" over property is the owner or the agent of the owner. Under the proof in the instant case, petitioner was neither. The Court below, however, concluded that his power to persuade the owner to sell the property to the buyer constituted "command over the goods." The power to persuade the owner of goods to sell them does not vest the person who exerts that power with authority himself to transfer title.

It is a fundamental rule of property law that no one can give what he has not. No one can sell personal property and convey title to it unless he is the owner or represents the owner or at some time acquires title to it.

Mitchell v. Hawley, 83 U. S. 554 (1872);
Williamson v. Berry, 49 U. S. 495, 543 (1850);
Williston on Sales, Second Edition, Sec. 311, p.
715.

An offer to sell is a proposal to enter into a contract whereby the seller agrees to transfer the goods and property to the buyer for a consideration called the price (Uniform Sales Act, Sec. 5). Neither Moret nor Waldorf Liquors, Inc., in accepting petitioner's offer to procure sources of whiskey for them for a fee, could have successfully sued petitioner upon his default for breach of contract for the sale of whiskey since he offered to sell none. Neither of them contended at the trial that petitioner offered to sell them anything except his services in influencing owners of whiskey to allocate and sell some to them. In this state of the record petitioner could not properly be convicted of offering to sell or selling whiskey, and affirmance of the judgment of conviction was error.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision of the Circuit Court of Appeals reversed.

Respectfully submitted,

WALTER BROWER,

By JOHN W. BURKE, JR.,
Counsel for Petitioner.

Dated: New York, July 16, 1945.





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CITATIONS

Statutes and Regulation:

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. IV, 901 *et seq.*:

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The Stabilization Act of October 2, 1942, c. 578, 56 Stat. 765, 50 U. S. C. App., Supp. IV, 961 *et seq.*:

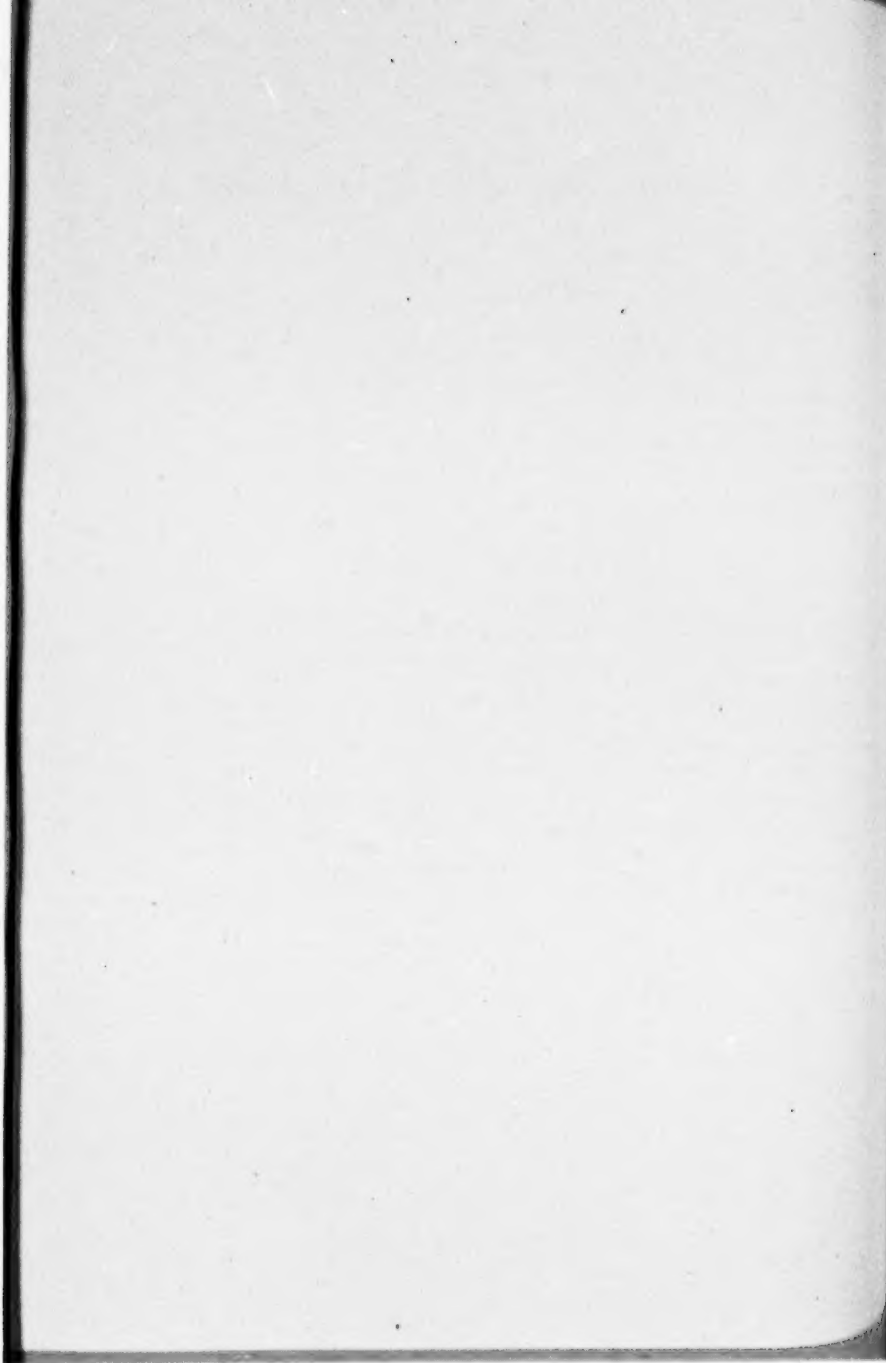
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In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 240

SOLLY WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 148-154) has not yet been reported. The opinion of the district court denying petitioner's motion to set aside the verdict (R. 133-137) is reported at 57 F. Supp. 747.

JURISDICTION

The judgment of the circuit court of appeals was entered June 20, 1945 (R. 155). The petition for a writ of certiorari was filed July 18, 1945. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended

by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this Court May 7, 1934.

QUESTIONS PRESENTED

1. Whether petitioner, who agreed to supply whiskey at a price which he fixed, was a seller of the whiskey even though delivery was made by the importer directly to the buyer.

2. Whether there was sufficient proof of the ceiling price applicable to the sales made by petitioner.

3. Whether the penalties prescribed by the Emergency Price Control Act of 1942 or those prescribed by the Stabilization Act of 1942 are applicable to the crimes charged.

STATUTES AND REGULATION INVOLVED

The Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App., Supp. IV, 901 *et seq.*, provides in pertinent part:

SEC. 2. (a) Whenever in the judgment of the Price Administrator * * * the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. * * *

SEC. 4. (a) It shall be unlawful * * * for any person to sell or deliver any commodity, * * * in violation of any regulation or order under section 2 * * *.

SEC. 205. * * * (b) Any person who willfully violates any provision of section 4 of this Act * * * shall, upon conviction thereof, be subject to a fine of not more than \$5,000, or to imprisonment for not more than two years in the case of a violation of section 4 (c) and for not more than one year in all other cases, or to both such fine and imprisonment. * * *

SEC. 302. (a) The term "sale" includes sales, dispositions, exchanges, leases, and other transfers, and contracts and offers to do any of the foregoing. * * *

Maximum Price Regulation No. 445, effective August 14, 1943 (8 F. R. 11161), provides in pertinent part as follows:

SEC. 7.8. *Compliance with this regulation*—(a) *No buying or selling above maximum prices.* On and after the effective date of this regulation, regardless of any contract, agreement or other obligation, no person to whom this regulation applies shall sell or supply, and no person in the course of trade or business shall buy or receive, any distilled spirits, wine or service at prices higher than the maximum price applicable to such sale under this regulation, and no person shall agree, offer, solicit or attempt to do any of the foregoing. However, prices lower than the maximum price may be charged or paid.

(b) *Evasion*. The maximum prices established under this regulation shall not be evaded by direct or indirect methods, whether by finder's fee, brokerage, commission, service, transportation or other charge or discount, premium or other privilege; by tying agreement or trade understanding; by any change in style or manner of packing; or in any other way.

SEC. 7.12. (b) (3) "Wholesaler" means any person (except a monopoly state or primary distributing agent) engaged in the business of buying and selling distilled spirits and/or wine without changing the form thereof, to persons other than consumers.

The Stabilization Act of October 2, 1942, c. 578, 56 Stat. 765, 50 U. S. C. App., Supp. IV, 961 *et seq.*, provides in pertinent part:

SEC. 7. (b) All provisions (including prohibitions and penalties) of the Emergency Price Control Act of 1942 which are applicable with respect to orders or regulations under such Act shall, insofar as they are not inconsistent with the provisions of this Act, be applicable in the same manner and for the same purposes with respect to regulations or orders issued by the Price Administrator in the exercise of any functions which may be delegated to him under authority of this Act.

SEC. 11. Any individual, corporation, partnership, or association willfully violat-

ing any provision of this Act, or of any regulation promulgated thereunder, shall, upon conviction thereof, be subject to a fine of not more than \$1,000, or to imprisonment for not more than one year, or to both such fine and imprisonment.

STATEMENT

An information in thirteen counts was returned against petitioner in the United States District Court for the Southern District of New York charging that, at various times in the latter part of 1943, he unlawfully offered and agreed to sell and did sell specified quantities of liquor at more than ceiling prices. Counts 1, 4, 7, 9, and 11 charged offers to sell. Counts 2, 3, 5, 6, 8, 10, 12, and 13 charged sales and deliveries of the liquor. The first ten counts were based on offers to sell and sales to one Moret; the last three on an offer to sell and sales to Waldorf Liquors, Inc. (R. 2-12.)

The evidence for the Government may be summarized as follows:

Moret, a liquor dealer from Atlanta, Georgia, testified that, while he was in New York, petitioner called upon him and asked him whether he was "interested in buying some Scotch Whiskey." Petitioner quoted the price as \$25.20 per case in bond, the billing price to be around \$11.82 and the balance to be paid in cash to petitioner. Moret agreed to buy the liquor and petitioner then told

him to send a letter to Park, Benziger & Co., an importer, ordering 500 cases. (R. 14-17; Pet. 4.) Moret sent the order and received the whiskey in two installments of 250 cases each (R. 17, 19). He paid Park, Benziger & Co. at the rate of \$11.82 per case and, at petitioner's request, sent \$6,804 in currency to petitioner's wife by air express. (R. 20-22.) Subsequently, petitioner called Moret and asked whether he could use another 500 cases. Moret agreed to take them and the transaction was handled in the same manner, except that the cash payment to petitioner was made before the liquor was delivered. (R. 22-23.) Still later petitioner told Moret that he could get 200 more cases, but that the price would be higher per case, the extra money to be in the form of a larger cash payment to petitioner (R. 24). The cash for this payment was sent to Moret's uncle in New York who, in turn, delivered it to petitioner (R. 25-28, 46-49). A further sale of 300 cases was arranged in the same manner, but only 150 cases had been delivered when Moret expressed a desire to end his dealings with petitioner. At Moret's request petitioner returned half the money paid to him on that transaction. (R. 28-30, 41-42.)

The Government also proved that petitioner offered Waldorf Liquors, Inc., 500 cases of assorted blend whiskey at \$5 above ceiling price, the extra money to be paid to petitioner in cash (R. 59, 60, 64). Only 250 cases were delivered

by International Distributors, an importer, and petitioner returned one-half of the money paid to him in cash (R. 60-61).

In submitting the case to the jury, the judge charged that petitioner was not guilty of the offenses charged if he was acting as a broker or finder; that in order to convict petitioner, they must find that he was a seller or an offerer (R. 113, 114, 115-116), but that "It is not necessary for a person who agrees to make a sale to have present possession or title of the commodity as long as he can later cause possession and title to be vested in the buyer" (R. 114).

Petitioner was found guilty as charged (R. 120). He was sentenced to six months' imprisonment on each of counts 1, 4, 7, 9, and 11, the sentences to run concurrently, and fined \$5,000 on each of counts 2, 3, 5, 6, and 12. Imposition of sentence was suspended on counts 8, 10, and 13 and petitioner was placed on probation for two years (R. 128).

ARGUMENT

1. Petitioner contends (Pet. 6, 7, 10-11, 16-19) that he was acting merely as a finder and hence that he was improperly convicted of selling liquor at prices in excess of the ceiling prices. The question whether petitioner was a finder or a seller was the one stressed by the trial judge in submitting the case to the jury, and the jury by its verdict has resolved that issue against petitioner.¹

The evidence amply supports the jury's verdict. The witnesses for the Government testified that petitioner made the initial offer to "get" whiskey for them at prices which he fixed, to be paid in a manner which he specified, and that they agreed to take it at such prices and on such terms. It is thus evident that they were not employing petitioner's services to persuade an importer to sell to them, but were agreeing to buy from petitioner. The initial agreements between petitioner and the government witnesses were therefore clearly contracts of sale. The fact that the contracts were performed by having those from whom the goods were obtained make delivery directly to the ultimate buyer instead of going through the formality of passing title through petitioner, does not serve to render the performance of the contract any less a sale. In any ordinary situation, as, for example, a contract to sell an automobile which the seller does not at the time own, there can be no question that, if the seller arranges to have the owner transfer possession and title directly to the purchaser, the former could not contend that no sale had been effected. Petitioner's acts fall squarely within the definition of "sale" given in the Uni-

¹ The subsequent amendment of Maximum Price Regulation 445 to define the status of finders, upon which petitioner relies to support his argument that his acts were not criminal at the time they were committed (Pet. 17), is not relevant, for petitioner was convicted as a seller, not a finder.

form Sales Act, Section 1, as "an agreement whereby the seller transfers the property in goods to the buyer for a consideration called the price." But even if, in the civil law of sales, a seller must at some time acquire title to the goods, that consideration would not be controlling here. "Sale," as used in the Emergency Price Control Act, is defined in Section 302 (a), *supra*, p. 3, to include "dispositions * * * and other transfers"—a definition clearly broad enough to cover petitioner's acts.

2. During the trial, government counsel stated that he was calling Mr. Benziger to prove the ceiling price. The court inquired whether there was any controversy about it, and petitioner's counsel replied that there was none. (R. 57.) It was then conceded that the ceiling price was \$11.82 in bond (R. 58). Petitioner's counsel also conceded that the ceiling price on the International Distributor's liquor (sold to Waldorf Liquors) was \$11.82 (R. 58).

Petitioner now argues (Pet. 6, 11, 15-16) that the stipulation referred only to the established ceiling price for sales of whiskey by importers, that even if he could be found to be a seller he was not an importer, and, hence, that there was a failure of proof as to the ceiling price applicable to his sales. It is clear from the circumstances under which the ceiling price was stipulated as \$11.82 that all parties considered that figure ap-

plicable to petitioner's transactions, and, we think, properly so. Petitioner made sales under a scheme whereby they appeared to be legitimate sales by an importer, and we submit that he should be held to the ceiling price applicable to the form which he chose to give to his sales.

In any event, petitioner was clearly a wholesaler under Maximum Price Regulation 445, defining "wholesaler" as "any person * * * engaged in the business of buying and selling distilled spirits and/or wine without changing the form thereof, to persons other than consumers" (*supra*, p. 4). As such, his ceiling price was a mark-up of 1.15 percent above the importer's price to him plus the cost of transportation. (Maximum Price Regulation 445, Sections 5.3, 5.4.) Petitioner had no cost of transportation because he did not have the liquor delivered to himself. Proof of the importer's ceiling price, therefore, was sufficient to establish that petitioner's sales were far above the ceiling price, even if the wholesaler's, rather than the importer's, price be held to govern the sales charged.

3. Petitioner's remaining contention (Pet. 6, 7, 10, 11-15) is that the criminal penalties provided by Section 11 of the Stabilization Act of 1942, fixing a maximum fine of \$1,000, apply to the offenses charged in the information, rather than those in Section 205 (b) of the Emergency Price Control Act, fixing a maximum fine of \$5,000. However, as the court below pointed out (R. 153-

154), Section 7 (b) of the Stabilization Act (*supra*, p. 4) specifically provides that the penalties of the Emergency Price Control Act shall apply to violations of regulations "issued by the Price Administrator in the exercise of any functions which may be delegated to him" under the Stabilization Act. It is thus evident from the Stabilization Act itself that Congress intended to preserve the penalty provisions of Section 205 of the Emergency Price Control Act for violations of price regulations. The legislative history of the Stabilization Act makes that fact even clearer. The conference report on that statute (88 Cong. Rec. p. 7723) explains Section 7 (b) as follows:

Section 7 of the conference agreement makes applicable to any regulations or orders issued by the Price Administrator, in the exercise of any functions which may be delegated to him under the authority of this bill, the same penalties and sanctions as are already applicable to regulations or orders issued by him under the Emergency Price Control Act of 1942. These include criminal penalties, treble damages, revocation of licenses, and civil injunctions. In addition, a general penalty provision is provided by section 11 for willful violations of the act and regulations promulgated thereunder. The penalty provided by such section is a fine of not more than \$1,000, or imprisonment for not more than 1 year, or both.

CONCLUSION

The decision below is correct, the case involves no conflict of decisions, and no question of general importance is presented. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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AUGUST 1945.

End

